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Preferential Trade and Investment Agreements and Regionalism[1]

Marc Bungenberg[2]

1 Introduction

The interrelation and differences between international trade law and international investment law have been discussed at length in other contributions of this volume. Thus, this chapter will only concentrate on the question of regional integration and its influence on international investment law. More particularly, it will address the question of whether, in contrast with international trade law, regional integration in the field of international investment law based on the conclusion of regional economic integration agreements may be seen as a stepping stone towards a more multilateral approach. This chapter will argue that international investment protection in a system of regional economic integration as well as regional international investment law may lead or contribute to a new approach in multilateralizing international investment law.

After a brief introduction to regionalism in general and to investment law as part of regional integration agreements in particular (Part II), this chapter focusses on the North American Free Trade Agreement (NAFTA)[3] and, notably, on the role of Chapter 11 (on international investment law) therein as well as the newly developing Trans-Pacific Partnership (TPP)[4] (Part III). In the analysis that follows, the European Union (EU) is given more attention, with firstly a specific focus on the intra-EU perspective and then on its new presence in this field of international economic law, in particular after the entry into force of the Treaty of Lisbon[5] on 1 December 2009 (Part IV). The extent to which the latest developments in the different regions lead to a multilateral agreement in international investment law will be discussed in the penultimate part of this contribution (Part V). Part IV will conclude.

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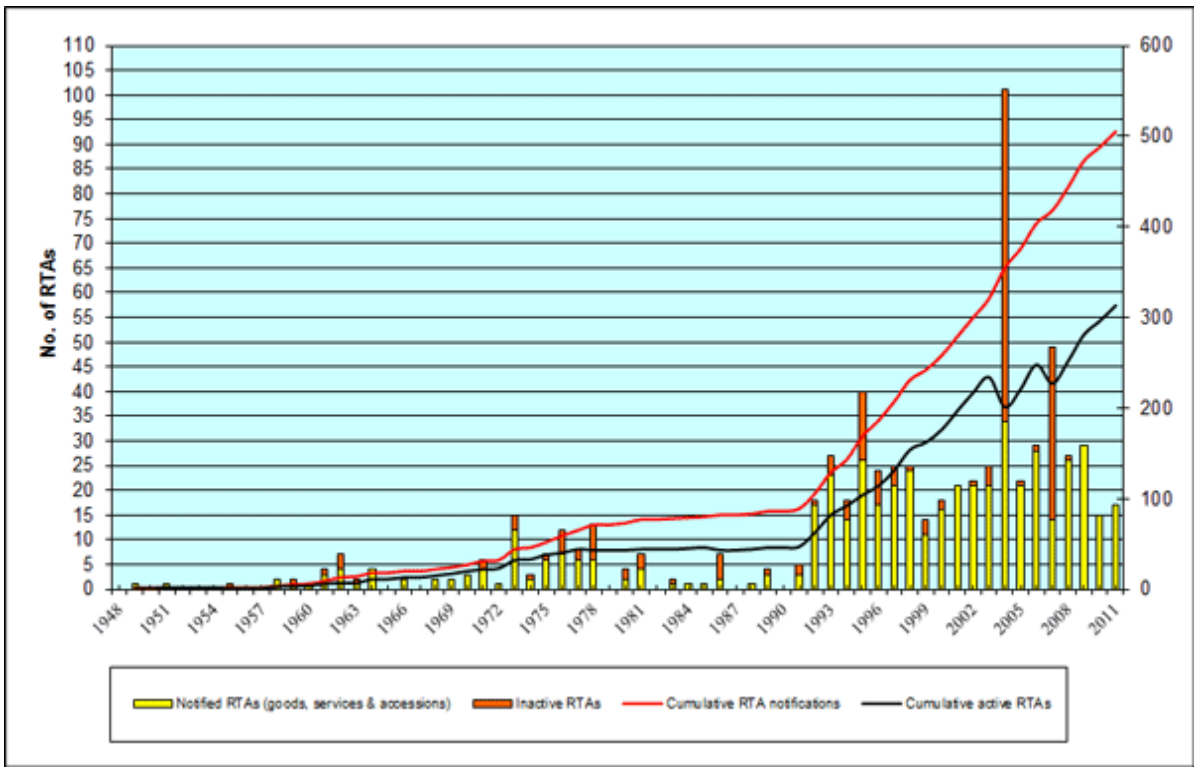
[3] North American Free Trade Agreement, 17 December 1992, (1993) 32 ILM 289 et seq and 605 et seq.

[4] On the TPP negotiations see, for example <http://www.ustr.gov/tpp> accessed 4 November 2012.

[5] See Consolidated Version of the Treaty on the Functioning of the European Union, 9 May 2008, OJ (C 115) 47.

2 Rising Regionalism and Trade and Investment being Part Thereof

Regionalism is on the rise. Although possibly criticized from a multilateral trade law-oriented approach, this fact cannot be ignored. Preferential and Regional Economic Integration Agreements – in particular in the form of Preferential Trade Agreements (PTAs) – have multiplied within the past twenty years. In 1990, approximately thirty to thirty-five regional trade agreements were in force, a number that doubled by 1995, and between 1995 and 2001, 100 more PTAs came into force.[6] An increasing number of PTAs continued to be concluded, especially after the Doha Round negotiations stalled (before they finally failed). By January 2012, some 511 notifications of PTAs had been received by the GATT/WTO Secretariat, 319 of these were in force.[7] The average WTO Member now has agreements with more than 15 countries.[8]



Source: WTO Secretariat

Scholars and politicians wondered whether these developments towards more regionalism should be seen as "stumbling blocks or building blocks for a more integrated and suc-

6 See F Duina, 'Varieties of Regional Integration: The EU, NAFTA and Mercosur' (2006) 28 European Integration 247.

7 See <http://www.wto.org/english/tratop_e/region_e/region_e.htm> accessed 4 November 2012. Interestingly, this same site gives access to a database that appears to acknowledge only 241 RTAs in force; see <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> accessed 4 November 2012.

8 C Freund and E Ornelas, Regional Trade Agreements (World Bank Policy Research Working Paper 5314, 2010) 6.

cessful economy."[9] International trade law has, since the GATT 1947, been based on a multilateral approach. Regional agreements on international trade are required to fulfill the criteria laid down in Article XXIV GATT 1947;[10] these agreements are very often characterized as having in general a negative effect on the multilateral trading system. *Jagdish Bhagwati* is more than critical in respect of this development and speaks of Regional and Preferential Trade Agreements as "Termites in the Trading System",[11] arguing that more and more PTAs in the long run will destroy the multilateral approach in world trade law.

The failure of the WTO Doha Round negotiations was one of the contributing factors to an even stronger "rise of bilateralism" that can be identified in international economic relations.[12] The EU stressed, on the one hand, that it would be committed to multilateralism, but, on the other hand, it stated in its "Global Europe" strategy of 2006, that "Free Trade Agreements (FTAs), if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation." Many key issues outside WTO law, including investment, could be addressed through FTAs.[13]

The most prominent examples of regional economic integration are NAFTA, the Free Trade Agreement of the Association of Southeast Asian Nations (ASEAN), South America`s Mercosur, the European Economic Area (EEA), the EU, and now coming up the TPP.[14] The trend towards regionalism is by no means homogenous, but every integration process reveals different characteristics especially in regard to supranationalism, topics addressed and ways of dispute resolution.[15] To give only a few examples, the EU shows supranational characteristics, which are absent in NAFTA and ASEAN; NAFTA has far stronger dispute resolution mechanisms than Mercosur; the EEA establishes the largest internal market worldwide; and the EU covers the strongest political aspect of integration

9 RZ Lawrence, Regionalism, Multilateralism and Deeper Integration, (The Brookings Inst. 1996) 2.

10 See on this for example C Herrmann, 'Bilateral and Regional Trade Agreements as a Challenge to the Multilateral Trading System' [2008] Außenwirtschaft 263.

11 J Bhagwati, Termites in the Trading System – How Preferential Agreements Undermine Free Trade (OUP 2008).

12 See on this, for example, K Heyden and S Woolcock, The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements (United Nations 2009).

13 See EU Commission, *Global Europe* (October 2006) 6 <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf> accessed 4 November 2012.

14 See on the topic of regional approaches esp S Schill and M Jacob, 'Trends in International Investment Agreements 2010-2011: The Increasing Complexity of International Investment Law' in KP Sauvent (ed), *Yearbook on International Investment Law and Policy 2011/2012* (OUP 2012) 141, 163-177.

15 Duina (n 5) 248; see on this in general also the comprehensive and comparative introduction in J McKay, MO Armengol and G Pineau (eds), *Regional Economic Integration in a Global Framework* (ECB 2005) 8 et seq.

and – differently from (or ahead of) other projects of regional integration – also regulates areas such as environmental or consumer protection.[16]

Independently from the field of trade law, it will be argued in the ensuing paragraphs that including investment law chapters in PTAs[17] may in the long run help to develop multilateral structures in international investment law, and regionalism may be one stepping stone towards a new multilateral investment agreement; or, in other words, incorporating investment law in regional agreements may take some spaghettis out of the bowl and minimize the number of International Investment Agreements, just as will the conclusion of new international investment agreements (IIAs) by the EU. In addition, in contrast with international trade law, within international investment law there has never been a real multilateral investment agreement that may be undermined by regionalism.

In regard to the interrelationship between economic integration and foreign direct investment (FDI), economic studies show that the pure fact of economic integration leads to a rise in FDI.[18] Typical PTAs primarily liberalize trade matters, but also deal with investments and/or the transfer of capital in one way or another, given that one element of 'economic globalisation' is the globalisation of capital; capital is a production factor and its free transfer stimulates trade in goods.[19] Therefore, PTAs very often are not 'purely trade-oriented' any more, but broader 'international economic agreements' containing, inter alia, rules on investment promotion and protection as well as articles on the free transfer of capital.[20] The comments of the Secretariat of the European Convention stated in this regard that the added reference to FDI was made 'in recognition of the fact that financial flows supplement trade in goods and today represent a significant share of commercial exchanges.'[21] The synergic effect of the expansion of trade and investment is supposed to conduce to further economic growth.[22] Limits on the ability of governments to interfere with the operation of foreign investors reduce the political risks associated with an investment, which should result in greater levels of investment in a given economy[23]; in other

16 See on this in general the contributions in F Laursen (ed) *Comparative Regional Integration*. *Europe and Beyond* (Ashgate 2010).

17 See on this in general UNCTAD, Investment Provisions in Economic Integration Agreements (2006).

18 See, for example, P Dee and J Gali, The Trade and Investment Effects of Preferential Trading Arrangements (NBER working paper 10160).

19 On the relationship between trade and investment see, for example, WTO, Report of the Working Group on the Relationship between Trade and Investment to the General Council (WT/WGTI/2 1998).

20 See, for example, A Reinisch, 'Investment Protection and Dispute Settlement in Preferential Trade Agreements' (2009) 21 ICSID Review 416.

21 CONV 685/03, Document of 23 April 2003, comments on Article 23.

22 P Gugler and J Chaisse, 'Foreign Investment Issues and WTO Law - Dealing with Fragmentation while Waiting for a Multilateral Agreement' in J Chaisse and T Balmelli (eds), *Essays on the Future of the World Trade Organization* vol I (Geneva: Editions Interuniversitaires Suisses 2008) 135 et seq.

23 S McGuire and M Smith, The European Union and the United States – Competition and Convergence in the Global Arena (Palgrave Macmillan 2008) 142.

words, rules on investment promotion and protection can stimulate trade relations.[24] Even without a specific chapter on investment comparable to Chapter 11 of NAFTA,[25] the process of regional economic integration has a close relationship to FDI: by extending the effective size of the market through the partner countries in the PTA, PTAs strengthen the investment climate for investors from the partner countries as well as from investors outside the region. The EU, for example, has increased its share in global FDI inflows following the formation of the internal market,[26] and so has Mexico after the entry into force of NAFTA.[27]

3 The Americas: NAFTA and the Trans-Pacific Partnership

At the time of its conclusion, NAFTA *was the only plurilateral PTA with an explicit chapter on investment promotion and protection.* Before its entry into force in 1992, no BITs existed between Mexico, the United States and Canada; only an FTA between Canada and the United States signed in 1989 contained investment provisions, including substantive protections, but no specific investor-state dispute settlement mechanism.[28] Mexico proposed to the United States in 1990 that they negotiate a bilateral agreement similar to the one between the United States and Canada; the US Government agreed to this request; it was supportive of the process of economic liberalization in Mexico and hoped that other countries in Latin America might be encouraged to follow this path of liberalization.[29] Subsequently, Canada made a proposal that it be a third signatory to a multilateral agreement – the NAFTA.

Especially for Canada it was important to trilateralize any US-Mexico agreement in order to avoid discrimination against the Canadian economy and its investors and not to let the United States have this comparative advantage. By trilateralizing the relationships Canada tried to prevent the United States from becoming the only hub in North America in this regard. The then negotiated and concluded NAFTA Chapter 11 contains stronger and more detailed investment provisions than those to be found in the US-Canada FTA of only three years earlier. While it is not surprising that the US-supported stronger investment provisions than those that existed in the US-Canada FTA, it is noteworthy that Canada as

[24] M Lesher and S Miroudot, *The Economic Impact of Investment Provisions in Regional Trade Agreements* (OECD Trade Policy Working Paper No. 36/2006).

[25] See on this supra Part III.

[26] M Blomström and A Kokko, *Regional Integration and Foreign Direct Investment: A Conceptual Framework and Three Cases* (Policy Research Working Paper WPS 1750, 1997) 12, 17 et seq.

[27] Ibid 28 et seq.; on the implications of regional integration via NAFTA in general see W R White, *The Implications of the FTA and NAFTA for Canada and Mexico* (Bank of Canada 1994); A O Krueger, 'NAFTA's Effects: A Preliminary Assessment' (2000) 23 The World Economy 6, 761 et seq.

[28] See Chapter Sixteen (Articles 1601-1611 and Annex) (Investment) Canada-US Free Trade Agreement (CUSFTA), reprinted in 27 I.L.M. 281.

[29] White (n 26) 4.

well as Mexico agreed to them.[30] Both countries are traditionally worried of US influence over their economies. But this had obviously changed in the early 1990s, since, as pointed out, there was a desire not to allow the United States to obtain a comparative advantage.[31]

Irrespective of the so-called multilateral investment framework of NAFTA, each of the three contracting states has up to now negotiated further agreements on its own. Among these three states, today, it is the United States that has concluded the largest number of BITs with third states, with a network of almost 50 international investment agreements as so-called "standalone BITs", 42 of which are currently in force.[32] In addition to these agreements, the United States has also incorporated investment protection provisions similar to those provided for in a BIT in nine PTAs in force with a total of 14 partner countries. Canada has concluded only 29 investment agreements[33] as well as three broader PTAs including investment chapters, apart from the NAFTA, currently in force,[34] but has a number of ongoing FTA negotiations, including also negotiations with the EU.[35]

Furthermore, in the wider Pacific region one can notice a clear change of direction away from a bilateral agreement structure, first to a tripartite agreement (NAFTA), and now, after the failure of an All American Free Trade Association, and under strong US influence, a new TPP,[36] which can be described as broad economic regionalism. All three NAFTA Member States are involved in this broader project of regional integration that will also affect international investment law. 2011 saw the announcement of the sketched TPP-outlines with an investment chapter, including provision for the state's right to regulate. The ambitious Agreement is currently being negotiated between eleven countries (Australia, Canada, Brunei Darussalam, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States), while at least Japan has declared an interest

[30] C Wilkie, 'Origins of NAFTA Investment Provisions: Economic and Policy Considerations' in Laura Ritchie Dawson (ed), *Whose Rights? The NAFTA Chapter 11 Debate* (Center for Trade Policy and Law 2002) 7, 15.

[31] MA Cameron and BW Tomlin, *The Making of NAFTA: How the Deal was Done* (CUP 2000) 65; JA Heindl, 'Toward a History of NAFTA`s Chapter Eleven' (2006) 24/2 Berkeley Journal of International Law, 672, 677.

[32] See <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> accessed 4 November 2012.

[33] See 'Total Number of Bilateral Investment Agreements Concluded, 1 June 2012' <http://unctad.org/Sections/dite_pcbb/docs/bits_canada.pdf> accessed 4 November 2012.

[34] Foreign Affairs and International Trade Canada, Negotiations and Agreements <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?view=d> accessed 4 November 2012. Canada has also concluded two further FTAs with very limited provisions on 'Services and Investment', see ibid.

[35] See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/index.aspx?view=d> accessed 4 November 2012; see on this also K Hübner (ed), *Europe, Canada and the Comprehensive Economic and Trade Agreement* (Routledge 2011).

[36] On the TPP negotiations and other developments, see for instance <http://www.ustr.gov/tpp> accessed 4 November 2012. On the TPP see, for example, M K Lewis, 'The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?' (2011) 34 B.C. Int'l & Comp. L Rev 27; D Elms and CL Lim, *The Trans-Pacific Partnership Agreement (TPP) Negotiations: Overview and Prospects* (RSIS Working Paper No. 232, 2012).

in joining the negotiations. Japan, Canada and Mexico's announcement to participate in the TPP negotiations came directly after the United States showed its interest in the project in 2011 and President Obama stressed at various occasions the "Asian Century"[37] – US Secretary of State Hillary Clinton introduced the term "America's Pacific Century" to describe the leading US foreign policy goal of the 21st century.[38] The envisaged TPP would create a market already 50 % bigger than the internal market of the European Union.

The investment law chapter is supposed to contain all relevant standards of investment protection, inter alia fair and equitable treatment (FET), compensation for expropriation, a most-favored-nation clause as well as investor-state dispute settlement, including under the ICSID Convention.[39] It is noteworthy that the TPP is negotiated among parties that have already in the past concluded international investment agreements between them. The United States for instance has previously concluded PTAs with Australia, Chile, Peru and Singapore, and of course with Canada and Mexico. The participation of the latter two countries in the negotiations raises the question of how the new agreement's relationship to NAFTA will be shaped. The case of the US-Australia FTA is also worth looking into for a different reason. That treaty famously excludes investor-state arbitration from its provisions. And while it had appeared for a moment that Australia would embrace such provisions in the TPP, new evidence seems to indicate now that in fact the Pacific country is unwilling to do so.[40] Nevertheless, the TPP-chapter on investment might develop into a new plurilateral investment agreement that could also attract further states.

Turning briefly from the Americas and the TPP negotiations towards institutional international investment law developments, three recent agreements in the ASEAN context are seeing their first years of operation.[41] Namely, the ASEAN Comprehensive Investment Agreement (ACIA),[42] the ASEAN-Australia-New Zealand Free Trade Agreement

[37] See <http://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament> accessed 16 November 2012.

[38] See H Clinton, 'America's Pacific Century' (2011) Foreign Policy <http://www.foreignpolicy.com/articles/2011/10/11/americas_pacific_century> accessed 4 November 2012.

[39] See the leaked draft document of unknown origin under <http://www.bilaterals.org/IMG/pdf/tppinvestment.pdf> accessed 24 November 2012.

[40] See e.g. 'News in Brief: Australia to Reject Investor-State Dispute Resolution in TPPA' (2012) 3 (2) Investment Treaty News <http://www.iisd.org/pdf/2012/iisd_itn_april_2012_en.pdf> accessed 4 November 2012.

[41] See on these developments V Bath and L Nottage, 'The ASEAN Comprehensive Investment Agreement and "ASEAN Plus"' in M Bungenberg, J Griebel, S Hobe and A Reinisch (eds), *International Investment Law – A Handbook* (C.H. Beck 2013) (forthcoming), Zewei Zhong, 'The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community' (2011) 6 Asian Journal of Comparative Law 1. See also A Tevini in Hofmann/Schill/Tams (eds.) Preferential Trade and Investment Agreements: Towards a New Ordering Paradigm in International Investment Law? Nomos (forthcoming 2013)

[42] 2009 ASEAN Comprehensive Investment Agreement, signed on 26 February 2009 in Cha-am, Thailand, entered into force on 29 March 2012

(AANZFTA)[43] and the ASEAN-China Investment Agreement[44] demonstrate a strong commitment to investment liberalization,[45] while parallel developments in the region may impact on the region's future stance on investor-state dispute settlement, notably Australia's rejection of it. These developments are just another example of plurilateral regional developments in international investment law and an example attesting to the prior statement that investment law regionalism is a stepping stone towards at least a less fragmented system.

4 Europe

The EU is often named as the example of the most evolved system of economic and political integration; but it also is – in contrast with NAFTA – a system without an explicit chapter on investment law. Yet, this is only a very first and superficial impression of an examination of the EU system. Its economic system of a sustainable market economy with open competition is based on an economic constitution[46] with strong elements of protection of individual economic rights. In EU investment law and policy, two constellations of provisions have to be clearly distinguished: those that reflect the internal (intra-EU) and those that reflect the external perspective (investments to and from third states).

4.1 Intra-EU Investment Protection

As already mentioned, the EU (or earlier EC) treaties do not encompass an investment chapter comparable to Chapter 11 of NAFTA. But also no one ever actually argued for the necessity of a classical investment protection chapter in EU law. Investments within the EU – in a scenario where an investor from Member State A invests in Member State B – are in any case (i.e. even without BIT protections) subject to a system of multilevel protection. Rules on the freedom of capital movement[47] were already part of the Treaty Establishing the European Economic Community signed in Rome 1957,[48] even though it was trade in goods at that time, which, although in a different manner than today, was at the centre of attention. The intra-EU perspective is a specific component of the internal market, that is determined not only by the four fundamental freedoms, but also to a large

[43] ASEAN-Australia-New Zealand Free Trade Area Agreement, signed on 27 February 2009, entered into force on various dates for different states in 2010, 2011 and 2012.

[44] Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations, signed on 15 August 2009 in Bangkok, entered into force 1 January 2010.

[45] See Bath and Nottage (n. 40).

[46] See on this A Hatje, 'The Economic Constitution' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart 2006) 587 et seq; M Bungenberg, *Vergaberecht im Wettbewerb der Systeme* (Mohr Siebeck 2007) 83 et seq.

[47] On this see S Hindelang, The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law (OUP 2009).

[48] Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (EEC Treaty or Treaty of Rome), Part Two, Title I (Free Movement of Goods) and Title III (The Free Movement of Persons, Services and Capital).

extent by the (multilevel) protection of human rights in the EU, comprising the European Convention on Human Rights (ECHR),[49] as well as protection at the national and the EU level.[50] Furthermore, customary international law[51] may be of relevance. Thus, it can be argued that even if there is no equivalent to NAFTA Chapter 11 in the EU, EU law contains standards of protection comparable to investment protection via BITs.[52]

It is obvious that the guarantees and standards of protection included in intra-EU BITs overlap with the fundamental freedoms of the internal market, the protection of fundamental rights in EU law and the ECHR.[53] The TFEU guarantees market access and the right to invest, and as long as the freedom of capital movement[54] is applicable, this guarantee also applies to non-EU-enterprises, even if they are not established in an EU Member State.[55] Protection against expropriation and the 'right to property' was introduced in European law by the Court of Justice of the European Union (CJEU)[56] as a fundamental right and is regarded as a necessary element of an 'open market economy with free competition' (see Article 119 TFEU). Furthermore, the principle of the protection of legitimate expectations as well as the principle of proportionality form part of primary EU law.[57]

Of course, there are also differences between the protection under EU law and under a typical BIT. In the Eureko case,[58] the arbitral tribunal stated, when comparing FET with the prohibition of discrimination in EU Law, that the FET standard is not 'entirely covered by a prohibition of discrimination,'[59] noting further that the respondent in the case did not allege that there is any principle of EU law that specifically forbids treatment that is not fair and equitable. The Tribunal does not consider that any such principle, independent of con-

[49] On this see C Pfaff, 'Investitionsschutz durch regionalen menschenrechtlichen Eigentumsschutz am Beispiel der Europäischen Menschenrechtskonvention (EMRK)' in Christina Knahr and August Reinisch (eds), *Aktuelle Probleme und Entwicklungen im Internationalen Investitionsrecht* (Richard Boorberg Verlag 2008) 163-192; Matthias Ruffert, 'The Protection of Foreign Direct Investment by the ECHR' (2000) 43 GYIL 116 et seq.

[50] Case 44/79, *Hauer vs. Land Rheinland-Pfalz* [1979] ECR 3727; C Calliess, 'The Protection of Property' in D Ehlers and U Becker (eds), *European Fundamental Rights and Freedoms* (de Gruyter 2007) 448 et seq.

[51] See on this R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) 11 et seq.

[52] See on this F Hoffmeister and G Ünüvar, 'From BITs and Pieces towards European Investment Agreements' in M Bungenberg, A Reinisch and C Tietje (eds), *EU Law and Investment Agreements* (forthcoming 2013).

[53] C Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24 J Int'l Arb 455 et seq; see also T Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 CML Rev 383; M Burgstaller, 'European Law and Investment Treaties' (2009) 26 J Int'l Arb 181 et seq.

[54] Article 63 TFEU.

[55] On the scope of application in these cases see Case C-524/04, *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107; Case C-196/04, *Cadbury Schweppes* [2006] ECR I-7995.

[56] Case 4/73, *Nold* [1974] ECR 491; Case C-84/95, *Bosphorus* [1996] ECR I-3953.

[57] See on the protection of legitimate interests M Bungenberg, 'Vertrauensschutz' in C Nowak and S M Heselhaus (eds), *Handbuch der Europäischen Grundrechte* (C.H. Beck 2007).

[58] *Eureko BV v Slovakia*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

[59] ibid para 250.

cepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is yet established in EU law. Treatment might be unfair and inequitable even if it is imposed on everyone regardless of nationality or, indeed, of any other distinguishing characteristic.[60]

Indeed, the Tribunal held that the rights offered to investors under the BIT in question, including FET, full protection and security and protection against expropriation, exceeded protections afforded under EU law.[61]

Despite the findings of the Eureko tribunal, the question of comparable standards of protection may also be resolved in favor of EU law coverage of typical protections emanating from a BIT. Nevertheless, the enforcement dimension differs substantially. BITs usually provide investors with direct access to international arbitral bodies,[62] whereas under EU law the investor has to deal with the courts of Member States. This is also stressed in the already mentioned Eureko case, where the tribunal stated that access to international arbitration under an investment treaty 'cannot be equated' with access to the host state's domestic judiciary.[63] Nevertheless, all EU Member States are obliged to follow the rule of law and secure an effective system with decentralized judicial protection.[64] Finally, any investor can directly lodge a complaint with the EU Commission – a comparable institution does not exist in any other international organization – if any of the abovementioned rights are violated; the Commission in its turn can initiate infringement proceedings before the CJEU against EU Member States on account of a violation of EU law.[65]

Because of the high standards of individual protection within the EU, Member States have rarely negotiated or concluded BITs with each other. Probably all of the formerly 190 intra-EU BITs in force were concluded before both states had acceded to the EU. Before accession (obviously) certain of these countries were not seen as safe destinations for European investments abroad. More recently, the EU Commission has asked EU Member States on already various occasions to terminate their existing network of intra-EU BITs,[66] as it sees a distortive effect of these BITs on the internal market and their potential to collide with superior EU law.[67] This is no less due to the fact that the EU is starting to

60 ibid paras 250 and 251 (internal footnotes omitted).

61 ibid para 263, see also paras 259 et seq.

62 A van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' (2008) 17 Finnish YIL 93 et seq, 123.

63 *Eureko v Slovakia* (n 57) para 264.

64 See on this concept C Nowak, 'Zentraler und dezentraler Individualrechtsschutz in der EG im Lichte des gemeinschaftsrechtlichen Rechtsgrundsatzes effektiven Rechtsschutzes' in C Nowak and W Cremer (eds), *Individualrechtsschutz in der EG und der WTO* (Nomos 2002) 47 et seq.

65 Article 258 TFEU.

66 EFC, *Annual Report to the Commission and the Council on the Movement of Capital and the Freedom of payments* (2006) 7; the EFC invited the Member States "to review the need for such BITs agreements and inform the Commission about the actions taken in this context so that progress can be reviewed by the EFC by the end of 2007".

67 See Hoffmeister and Ünüvar (n 51) at footnote 10; see also T Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 CML Rev 383, 426 et seq.

develop its own investment policy, but by October 2012, only a handful of intra-EU BITs had been terminated.[68]

4.2 Extra-EU Investment Law and Extra-EU Regional Integration

Before 1 December 2009, neither the EU nor its Member States were able to negotiate international investment agreements comparable to those of other actors for a matter of distribution of competences.[69] The intention of the Lisbon Treaty's far-reaching transfer of competences over FDI is to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy.[70] The EU's bargaining power is stronger than that of individual Member States, in particular the smaller ones.[71] The EU Commission is currently showing a great interest in concluding FTAs with investment chapters, while also a standalone EU BIT with China is envisaged.[72] In this regard it has to be stressed that each EU IIA will lead to the termination of multiple Member State BITs. For instance, a possible EU-China BIT would lead to the termination of currently 26 Member State BITs with China, an EU-India BIT to the termination of 23 Member State BITs,[73] and an EU-Singapore BIT to the termination of 12 Member State BITs.[74] Furthermore, at the time of writing, the EU is negotiating PTAs with, inter alia, the Ukraine, the Gulf Cooperation Council, Libya, while mandates have been given to the Commission for negotiations with Egypt, Jordan, Morocco and Tunisia.[75] It is most likely that negotiations will start with the United States and Australia[76] as well.

[68] Eg the BIT between Italy and Hungary was terminated in April 2009; the Czech Republic initiated the termination process for 23 Czech BITs, which the country had concluded with individual EU Member States before its accession to the EU. See, UNCTAD, *Recent developments in international investment agreements (2008 – June 2009)* (IIA Monitor No. 3 2009) 5.

[69] See on this, for example, M Bungenberg, 'The Politics of the European Union's Investment Treaty-Making' in Tomer Broude, M L Busch and A Porges (eds), *The Politics of International Economic Law* (CUP 2011), 133 et seq.

[70] European Commission*, Draft Articles Concerning External Action* (CONV 685/03, 23 April 2003).

[71] J Karl, 'The Competence for Foreign Direct Investment – New Powers for the European Union?' (2006) J. World Inv & Trade 413, 425.

[72] European Commission Communication. Towards a comprehensive European international investment policy. Brussels, 7.7.2010, COM(2010)343 final <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> accessed 28 November 2012, 7; see further Council of the European Union Press Release, 3109th General Affairs Council meeting, Brussels, 12 September 2011. 13587/11. <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/124579.pdf> accessed 28 November 2012, 13

[73] Total number of Bilateral Investment Agreements concluded, 1 June 2012 <http://unctad.org/Sections/dite_pcbb/docs/bits_india.pdf> accessed 4 November 2012.

[74] Total number of Bilateral Investment Agreements concluded, 1 June 2012 <http://unctad.org/Sections/dite_pcbb/docs/bits_singapore.pdf> accessed 4 November 2012.

[75] See Press Release: EU agrees to start trade negotiations with Egypt, Jordan, Morocco and Tunisia, Brussels, 14 December 2011, < http://trade.ec.europa.eu/doclib/press/index.cfm?id=766 > accessed 4 November 2012.

[76] See J M Barroso, 'Old Allies, New Opportunities: EU-Australia Business Links Towards 2020' (Europe Australian Business Council Oration, SPEECH**/**11/550**,** 6 Sept. 2011).

Taking into account the problem of limited EU competence, given that the Common Commercial Policy does not cover portfolio investment,[77] scholars are proposing different ways forward. *Tillman R. Braun* discusses a kind of complementary and correlated European system of investment protection, whereby the EU would conclude a 'framework' investment treaty while the 'details' of investment protection would be left to EU Member States to determine, thus leading to a type of multi-level governance.[78] *Joern Griebel* from the International Investment Law Centre Cologne has developed the idea of a "Europe-Based Open Investment Treaty".[79] *Griebel*'s idea is a convention that is signed in a first step by the EU as well as its Member States, and that is also open for ratification by third parties. The *Griebel* proposal would give an opportunity to move from a European regional agreement to a plurilateral and later to a multilateral investment agreement. Both approaches take the limited EU competence into account, both concepts are based on cooperation between the EU Commission and the EU Member States. Even if the *Griebel* proposal may seem too idealistic at first sight, implementing elements of such an approach into a new transatlantic dialogue, or trilogue, would be in the interest of the EU, its Member States as well as in the interests of Canada or/and the United States; at the same time, this would satisfy the EU constitutional obligation to give preference to a multilateral approach.[80]

Either way, because of the still partly limited competence of the EU, EU Member States will most likely also become parties of any new EU IIAs, which will be concluded as mixed agreements. This will lead to a plurilateral agreement, with both the EU and EU Member States (being) involved. In addition, a new approach turning away from fragmentation and moving towards multilateralism would be a Plurilateral Investment Promotion and Protection Platform, an agreement signed by both the EU and its Member States and open for signature by third countries too.[81] This Platform may be a tool for the EU neighborhood policy, association policy, development policy, etc. Therefore, only the "European contribution" of such a solution may easily "attract" some fifty or more countries, taking the negotiating power of the EU in these policy fields seriously into account. Combined with US and Chinese negotiating power, a multilateral agreement on investment could finally become a reality. The following Part will explore this possibility of a shift from the regional to a multilateral approach.

[77] See M Bungenberg, 'The Division of Competences Between the EU and Its Member States in the Area of Investment Politics' in M Bungenberg, J Griebel and S Hindelang (eds), *International Investment Law and EU Law* (Springer 2011) 29.

[78] T R Braun, 'For A Complementary European Investment Protection' in Bungenberg et al (n 76) 101.

[79] J Griebel, 'Überlegungen zur Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrags von Lissabon' (2009) 55 RIW 473 et seq; J Griebel, 'The New Great Challenge after the Entry Into Force of the Treaty of Lisbon: Bringing About a Multilateral EU-Investment Treaty' in Bungenberg et al (n 76) 140.

[80] See Article 21 TEU.

[81] See on this topic Griebel (n 78) 55 RIW 473.

5 From Regional to Multilateral Economic Integration

Regional integration with spillover effects also into investment policy is taking place in the Americas just as it is taking place in the Asian and Pacific regions, as described above. Such a plurilateral approach could also stem from EU initiative, but currently the EU is only negotiating at the bilateral level. Nevertheless, the present section will discuss one theoretically possible way to ultimately reach multilateralism in international investment law: a future merger between the three most influential "hubs" in international investment law. A first step towards such an outcome has already taken place: as will be discussed below, the United States and Europe are starting to develop a common approach to investment protection.[82]

For regional integration to lead to a multilateral treaty, participation of the key players in the game of investment policy and politics is necessary. Together with the EU's transatlantic partners, a new extended regionalism would seem possible. If China is made part of this development, the most influential global actors in investment politics would have the opportunity to promote a uniform agreement on investment. Here the question would be if other economic superpowers share this interest with the EU.

An EU-Mexico FTA[83] already exists, and, because of the synergies between trade and investment, an extension of the agreement to cover investment is advantageous to the parties. Furthermore, investment policy is being discussed in the ongoing EU-Canada negotiations on a Comprehensive Economic and Trade Agreement.[84] In the wake of yet another stalemate reached in the WTO-Doha negotiations in December 2011, German Chancellor Angela Merkel and UK Prime Minister David Cameron brought up the idea of an EU-US FTA, following on from an earlier idea advanced by Angela Merkel and French President Nicolas Sarkozy and reflected in statements by other European leaders.[85] At EU level, a European Council statement of 30 January 2012 noted the desire to 'consider all options for boosting EU/US trade and investment.'[86]

[82] See 'Press Release: EU and US Adopt Blueprint for Open and Stable Investment Climates, Investment: Brussels, 10 April 2012 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=796> accessed 4 November 2012 and Statement of the European Union and the United States on Shared Principles for International Investment <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf> accessed 4 November 2012.

[83] Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, signed on 8 December 1997, different chapters entered into force in 2000 and 2001, OJ 2000 L 276/45.

[84] See C Lévesque, 'The Challenges of "Marrying" Investment Liberalisation and Protection in the Canada-EU CETA' in Bungenberg et al (n 51).

[85] J Murphy, 'Toward a Transatlantic Trade Agreement: Gaining Momentum' (Free Enterprise 2012) <http://www.freeenterprise.com/international/toward-transatlantic-trade-agreement-gaining-momentum-0> accessed 4 November 2012.

[86] European Council, Statement of the Members of the European Council, 'Towards Growth-Friendly Consolidation and Job-Friendly Growth', Brussels, 20 January 2012

A further step in influencing the development of international investment law has lately been taken by the EU together with the United States. In the framework of the Transatlantic Economic Council, the EU und the United States 'have developed a blueprint for creating and maintaining stable, predictable and transparent investment regimes'.[87] In parallel to an endorsement of the standards of non-discrimination and transparency, a high level of investment protection in general, along with a fair and binding dispute settlement mechanism that includes investor-state arbitration, host states are expected to 'maintain the right to regulate in order to pursue legitimate public policy objectives.'[88] An Interim Report[89] on possible future negotiation issues pointed out, that the 'aim would be to negotiate investment liberalisation and protection provisions on the basis of the highest levels of liberalisation and protection that both sides have negotiated to date;' the interim report was welcomed by Presidents Barroso and Obama.[90]

Discussions on an EU-China Agreement started after an executive-to-executive meeting in April 2010 between Commission President Barroso and Chinese Premier Wen Jiabao.[91] A 'Joint EU-China Investment Task Force' was launched over the course of the summer of 2010 in order to 'explore the scope for deeper cooperation on investment, including considerations for a possible standalone investment agreement;'[92] the Commission consequently launched a public consultation on this matter.[93] Even though there exist 26 BITs between EU Member States and China, it is most likely that the EU and China will start negotiating a "standalone EU-China IIA," which would replace the current EU Member States-China BIT system.[94] As *Wenhua Shan* and *Sheng Zhang* argue, the current une-

<http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/127599.pdf> accessed 4 November 2012.

87 See 'Press Release: EU and US Adopt Blueprint for Open and Stable Investment Climates, Investment: Brussels, 10 April 2012 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=796 and Statement of the European Union and the United States on Shared Principles for International Investment <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf> accessed 4 November 2012.

88 See Press release (n 86).

89 Interim Report to Leaders from the Co-Chairs, *EU-U.S. High Level Working Group on Jobs and Growth* (2012) <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149557.pdf> accessed 4 November 2012.

90 See 'Transatlantic Trade Relations: Statement by EU Trade Commissioner Karel de Gucht on the Interim Report of the EU-US High-Level Working Group on Jobs and Growth' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=807> accessed 4 November 2012.

91 See Press statement by President Barroso following the executive-to-executive meeting with Chinese Premier Wen Jiabao Joint press conference Beijing, 29th April 2010 (Joint Press Conference, SPEECH/10/197, 29 April 2010), <http://europa.eu/rapid/press-release_SPEECH-10-197_en.htm?locale=en> accessed 28 November 2012.

92 See 'Public Consultation on the Future Investment Relationship between the EU and China' <http://trade.ec.europa.eu/consultations/?consul_id=153 > accessed 4 November 2012.

93 Ibid.

94 European Commission Communication. Towards a comprehensive European international investment policy. Brussels, 7.7.2010, COM(2010)343 final <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> accessed 28 November 2012, 7

ven protection and the lack of a level playing field in the legal framework governing foreign investment at the bilateral level between China and the EU demonstrate that an EU-China BIT is imperative. An EU-China IIA gives the EU and China the opportunity to upgrade their existing BIT policy to new international standards and best practices. Thereby they have the possibility of influencing the entire international investment law system towards a stronger explicit recognition of the necessity to regulate in the public interest. Furthermore, a successful conclusion of an EU-China BIT will improve the relations between China and the EU and will further strengthen the international investment regime driving it out of the 'legitimacy crisis' and the 'new regionalism'.[95]

On the third side of this EU-US-China-triangle, negotiations of a US-China BIT have already started. After exchanging their drafts in 2010, China and the United States formally commenced negotiations of the US-China BIT in the 4th Strategic and Economic Dialogue held in May 2012.[96]

One of the crucial questions concerning a trilateral solution is whether the three economic superpowers do follow the same general approach. The existing BITs between EU Member States and China comply mostly with the OECD Model of 1962[97] with a strong emphasis on standards of investor protection and rarely contain any 'exception clauses' for public policy regulation. This restrictive 'European approach' will most probably be abandoned in the near future with more room for public policy considerations.[98] It is most likely that the new EU FTA investment chapters (namely in the context of EU negotiations with Canada and Singapore) will follow the 'NAFTA model' and thus will be turning away from the 'traditional European BIT approach.' The Chinese approach to BITs has been recently undergoing similar modifications, this can be obviously be seen in a comparison between the China-Japan-South Korea IIA[99] as well as the China-Canada IIA[100] - both of 2012 - and the China Germany BIT of 2003[101].

[95] See W Shan and S Zhang, 'The Potential EU-China BIT: Issues and Implications' in Bungenberg et al (n 51).

[96] See Xinhua, 'China – U.S. Strategic and Economic Dialogue Productive' (2012), <http://www.china.org.cn/business/2012_S&ED/2012-05/05/content_25308809.htm> accessed 4 November 2012; see on these negotiations K Qingjiang, 'U.S.-China Bilateral Investment Treaty Negotiations: Context, Focus and Implications' (2012) 7 AJWH 181 et seq; W H Maruyama, J T Stoel and C B Rosenberg, 'Negotiating the U.S.-China Bilateral Investment Treaty: Investment Issues and Opportunities in the Twenty-First Century' (2010) TDM; Kong Qingjiang, *US-China Bilateral Investment Treaty Negotiations* (2010 EAI Background Brief No. 507).

[97] OECD, *Draft Convention on the Protection of Foreign Property*, 1962 (OECD, 1962), adopted 12 October 1967, <http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf> accessed 28 November 2012 ; see on this, for example, Schwarzenberger, *Foreign Investments and International Law* (Praeger 1969) 109 et seq.

[98] See C Titi, 'EU Investment Agreements and the Search for a New Balance: A Paradigm Shift from laissez-faire Liberalism toward Embedded Liberalism?' Columbia FDI Perspectives (forthcoming).

[99] See <http://www.mofa.go.jp/announce/announce/2012/5/0513_01.html> accessed 4 November 2012.

As market access will be one of the 'hot topics' of prospective EU-China as well as US-China negotiations, this question could be left for future negotiations; a built-in agenda comparable to the GATS with a positive-list approach on market access[102] would be a first step in a trilateral agreement 'Plurilateral Investment Agreement' among the EU, China and the United States as founding parties. On a reciprocal-list approach, extended market access should be possible for EU and US investors – US agreements already today follow a reciprocity-based approach.

On the other hand, the implementation of an investor-state arbitration mechanism provided for in future agreements – mentioned in the mandate for EU negotiations an investment law chapter in future FTA`s already being negotiated with Canada, India and Singapore and the EU-US blueprint[103] – will remain difficult from an EU law perspective, after the CJEU imposed strict limitations on the creation of a judicial body outside the EU system, especially with its Opinion 1/09[104]. Therefore, investor-state dispute settlement may not be an option for future EU Investment Agreements – the CJEU will have to decide on this crucial issue!

In addition, obligations to promote social standards, sustainable development, human rights, good governance, etc. have to be included in such a future 'EU Model BIT' because of the constitutional obligation to carry out the Common Commercial Policy according to the general principles and objectives enumerated in Article 21 of the Treaty on European Union. Issues such as the right to regulate, environmental matters, questions of sustainable development and the protection of human rights as well as the incorporation of social standards into future international investment agreements or a link to the ILO Conventions will have to be discussed and satisfactorily addressed.[105] The European Parliament, a strong player in the new institutional set-up of the EU Common Commercial

[100] Signed on 9 September 2012, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=en&view=d)> accessed 4 November 2012.

[101] BGBl. II (2005) 732 . See T R Braun and P Schonard, 'Der neue deutsch-chinesische Investitionsförderungs- und –schutzvertrag' (2007) RIW, 561 et seq.

[102] See on this, for example in C Herrmann, W Weiß and C Ohler (eds), *Welthandelsrecht* (2nd edn, C.H. Beck 2007) 399; see on the positive list approach also Patrick Low and Aaditya Mattoo, 'Is There a Better Way? Alternative Approaches to Liberalization Under the GATS' in P Sauvé and R M Stern, *GATS 2000: New Directions in Service Trade Liberalization* (BIP 2000).

[103] See 'Press Release: EU and US Adopt Blueprint for Open and Stable Investment Climates, Investment: Brussels, 10 April 2012 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=796> accessed 4 November 2012 and Statement of the European Union and the United States on Shared Principles for International Investment <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf> accessed 4 November 2012.

[104] Opinion 1/09 [2011] of the Court of 8 March 2011 [2011] ECR-I 0000; on this see for example Nikos Lavranos, 'Designing an International Investor-to-State Arbitration System after Opinion 1/09' in M Bungenberg and C Herrmann (eds), *CCP after Lisbon, Special Issue to the EYIEL* 2013 (forthcoming).

[105] See on this C Vedder, 'Linkage of the Common Commercial Policy to the General Objectives for the Union's External Action' in Bungenberg and Herrmann (n 103).

Policy after the entry into force of the Lisbon Treaty, has asked the Commission to reinvent Europe's investment policy and to insert the abovementioned policy objectives laid down in Article 21 TEU into its foreign investment policy.[106]

6 Conclusion

All attempts to establish a multilateral investment agreement either in or outside the WTO have failed up to now, but regional integration may serve as a stepping stone towards a new multilateral approach. Because of the lack of a present uniform multilateral approach, it has been up to the states to set up their individual networks of (so far mostly) bilateral investment agreements. A merger between the big "hubs" of regional economic integration in the field of investment law is necessary to achieve real multilateralism. As current developments show, this does not seem impossible. The EU currently seeks to establish its own new and independent investment policy with ongoing investment negotiations with Canada, Singapore and India and further envisaged negotiations with, inter alia, the United States and China.

Among the crucial issues to be discussed in the EU-China negotiations will be the questions of market access and investor-state dispute settlement as well as the inclusion of social standards and the protection of human rights. Nevertheless, with their networks of BITs, the EU, the United States and China have a chance to influence this system towards the adoption of more coherent standards and eventually towards a multilateral approach. If China, the United States and the EU

- agree on identical wording of these BITs (EU-China, China-US, EU-US), or preferably
- negotiate a trilateral investment treaty, and
- agree to conclude with third states only investment agreements with an identical wording to the EU-China-US investment agreement, and
- open the trilateral investment agreement for accession by third countries,

a new multilateralism in international investment law outside the WTO is possible. The spaghetti bowl of bilateral investment treaties could then turn into a Lasagna plate!!

[106] On this for example C Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon* (Universität Halle-Wittenberg 2009) 19 et seq; M Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon' in C Herrmann and J-P Terhechte (eds), *European Yearbook of International Economic Law* (2010) 123, 128.

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